

## **I. SUMMARY**

This Prosecutorial Report (Report) details the findings of the Prosecutorial Staff's investigation into 183 complaints of slamming against Business Options, Inc. (BOI).<sup>1</sup> The Report describes how BOI violated 35-A M.R.S.A. § 7106 and Chapter 296 of the Commission's Rules by making 195 unauthorized carrier changes.<sup>2</sup> We will show that BOI used deceptive tactics in its marketing and third-party verification (TPV) procedures to induce Maine consumers to either unknowingly consent to a change in their carrier intrastate toll carrier<sup>3</sup> or to provide personal information which was used to make the change in carrier without the consumer's express consent. BOI marketing personnel intentionally misrepresented themselves to Maine consumers, many of whom were elderly, to mislead consumers into believing that they were speaking to Verizon or AT&T personnel (rather than BOI personnel) and that "Business Options" was merely a calling plan offered by Verizon or AT&T to good customers who paid their bills on time.

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<sup>1</sup>For purposes of this Report, "BOI" refers to Business Options, Inc., Buzz Telecom, U.S. Bell, Avatar Enterprises, and any affiliates, successors or assigns. BOI's principle place of business is 8380 Louisiana Street, Merrillville, Indiana. It is an Illinois corporation, 98% owned by Kurtis Kintzel and Keanan Kintzel. It also appears that both Kurtis and Keanan Kintzel are or have been officers of US Bell Corporation and Buzz Telecom Corporation – both of which have the same address as BOI. In the Matter of Business Options, Inc., Notice to Show Cause and Notice of Opportunity for Hearing, FCC Docket No. EB-03-85 (Dec. 8, 2003) at fn 4.

<sup>2</sup>See Exhibit A, Summary of BOI Chapter 296 Violations.

<sup>3</sup>In some cases, both the intrastate and interstate carriers were changed, while in other cases, only one of the carriers was changed. The Commission has the authority to resolve complaints relating to both intrastate and interstate slamming but can only assess penalties for intrastate slamming. Accordingly, this Report focuses on instances of intrastate slamming. The Federal Communications Commission (FCC) is currently pursuing enforcement action against BOI based, in part, on interstate slams that occurred in Maine. In the Matter of Business Options, Inc., Notice to Show Cause and Notice of Opportunity for Hearing, FCC Docket No. EB-03-85 (Dec. 8, 2003).

The Commission's Consumer Assistance Division (CAD) has already made findings of slamming in 167 of the complaints filed with the Commission.<sup>4</sup> Given the unusually high number of complaints and the deceptive practices used by BOI, the Prosecutorial Staff requests that the Commission open an investigation and consider assessing an administrative penalty of \$750,000 pursuant to 35-A M.R.S.A. § 7106. We also request that the Commission revoke BOI's certificate to operate in Maine and refer this matter to the Attorney General's Office for possible criminal prosecution.

## **II. BACKGROUND**

On May 28, 1996, the Commission issued BOI a certificate of authority to operate in Maine as an interexchange carrier. The Commission conditioned BOI's certificate, as it does all certificates, upon BOI's adherence to Maine law and the Commission's Rules.

Since February 7, 2002, the CAD has received 183 complaints from Maine consumers regarding unauthorized changes in their preferred toll carrier by BOI.<sup>5</sup> Most of the consumers stated that they had never heard of BOI until the charges appeared on their local phone bill or they received a bill directly from BOI. Many consumers recall speaking with someone about their phone service but remember that the person specifically stated they worked for Verizon or AT&T and that their rates were being lowered because they paid their bills on time. These consumers, many of whom were elderly, did their best to protect themselves by asking the right questions (i.e., who the caller worked for, whether the call related to changing phone service), only to be directly deceived by BOI's marketing personnel.

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<sup>4</sup>BOI has not appealed any of these decisions.

<sup>5</sup>In addition, the CAD received complaints from nine consumers who said they agreed to change their service to BOI, but were not charged the promised rates.

BOI was notified by the CAD of each of the consumer complaints as they were received. In addition, on February 27, 2002, March 28, 2002, and July 3, 2002, the CAD sent letters to William Brzycki, Vice President of BOI, which: (1) described the types of deceptive marketing calls Maine consumers were experiencing; (2) expressed concern about the deceptive marketing methods; (3) advised him that BOI's third party verification process was in violation of Commission rules; (4) advised him that the CAD had identified numerous unauthorized changes of intrastate telephone service and that these unauthorized changes violated Maine law and Commission rules and could result in an assessment of a penalty of up to \$5,000 for each day a violation continued, up to a maximum of \$40,000 for a first offense, and a maximum of \$110,000 for subsequent offenses; and (5) stated that the CAD was particularly concerned about BOI's practice of resubmitting a carrier change order after the consumer had left BOI to return to their preferred carrier and that this practice clearly violated Commission rules which require authorization each time a consumer's service is changed.<sup>6</sup>

### **III. LEGAL STANDARDS**

Section 3(A) of Chapter 296 of the Commission's Rules requires carriers to obtain authorization from the customer (or the customer's spouse or legal guardian) and to verify the authorization (in writing, electronically, or orally) pursuant to Section 3(B) before submitting an order for a preferred carrier change. Section 3(B)(3) requires that any oral verification of an order be conducted by a qualified, independent third-party verifier. The tape of the verification must include a unique identifier for the customer, such as the customer's date of birth or social security number. Pursuant to

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<sup>6</sup>See Exhibit B.

Section (B)(3)(a-e) of the Commission's Rules, the verification will be considered valid only if: (1) the verification data is maintained and stored for two years by the independent verifier; (2) the verifier informs the customer that the customer is authorizing a change in telecommunication carriers and provides the identity of the new telecommunications carrier; (3) the independent verifier is not owned, managed, controlled or directed by the carrier or the carrier's marketing agent; (4) the independent verifier has no financial incentive to confirm change orders for the carrier or its marketing agent; and (5) the independent verifier operates in a location physically separate from the carrier or its marketing agent. If the customer is switching more than one service, i.e., both interstate and intrastate toll, Chapter 296 requires that a carrier obtain separate authorizations, i.e., ask separate questions, for each service it will switch.

#### **IV. SLAMMING VIOLATIONS**

##### **A. Invalid TPV Process**

None of the 133 TPVs submitted by BOI in response to the CAD's investigation of the 183 slamming complaints against BOI meet the requirements of the Commission's Rules. Thus, none of the carrier changes made by BOI for Maine consumers were validly verified and each of the carrier changes must be considered a slamming violation.

As stated above, for a TPV to be valid, the third-party verifier must be an independent entity, operating in a physically separate space, and must not receive any financial or other incentive for verifying the carrier change. Ch. 296, § 3(B)(3). The evidence uncovered in our investigation, as well as the FCC's investigation, clearly

shows that BOI's third-party verifiers were not independent and were located in the same offices and that the verifiers were paid by BOI - thus there was a financial incentive for the verifiers to confirm the BOI orders.<sup>7</sup>

F&G Verifications performed third party verifications for BOI during the time in 2002 when Maine consumers had their service changed to BOI.<sup>8</sup> According to BOI employee Elizabeth Rosas, Vice President of Operations, Buzz Telecom (an affiliate and/or owner of BOI) paid the salaries of the four F&G employees making verification calls to Maine consumers.<sup>9</sup> Further, two of the consumers who filed complaints against BOI with the CAD wrote down the telephone numbers displayed on their caller ID for both the telemarketing and third party verification calls and the numbers were almost identical.<sup>10</sup> Records of Ameritech, a local exchange provider, indicate that all four numbers were listed for Buzz Telecom, 8380 Louisiana Street, Merrillville, Indiana. Clearly, F&G Verifications does not meet the requirement of the Chapter 296 § 3(B)(3)(c) that the third-party verifier not be "owned, managed, controlled, or directed" by the carrier.

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<sup>7</sup>In the Matter of Business Options, Inc., Memorandum Opinion and Order, FCC Docket No. EB 03-85 (Dec. 8, 2003) at ¶ 22.

<sup>8</sup>Until early 2003, F&G Verifications used a verification script that stated the caller was with Great Lakes Verification, the name of the company that performed third party verifications for BOI before F&G Verifications. See Exhibit E, Kurtis Kintzel Deposition, 7/14/03 at 77-79.

<sup>9</sup>See Exhibit F, Elizabeth Rosas Deposition, 7/15/03 at 17. See *also* Exhibit D, William Brzycki Deposition, 7/18/03 at 34; Exhibit E, Kurtis Kintzel Deposition, 7/14/03 at 79, 82-83, 92.

<sup>10</sup>Sheila Knight received a telemarketing call from telephone number (219) 793-1477 and a verification call from telephone number (219) 793-1474. Ida Smith received a telemarketing call from telephone number (219) 793-1481 and a verification call from telephone number (219) 793-1479. See Affidavits of Sheila Knight and Ida Smith at Exhibit C.

In addition to managerial independence problems, BOI's verifier was located in the same building as, and in offices adjacent to, BOI.<sup>11</sup> F&G Verifications was located in a connecting office adjacent to BOI's offices at 8380 Louisiana Street in Merrillville, Indiana. During their recent FCC depositions, BOI's President, Kurtis Kintzel, as well as BOI's former Vice President, William Brzycki, both admitted that BOI employees, including salespeople, could physically enter the area where the verifiers worked.<sup>12</sup> Thus, BOI violated Section 3(B)(3)(e) of the Commission's Rules by using a verifier that was not located in a physically separate office from BOI.

The format of BOI's TPVs also violates the Commission's Rules. The question posed by BOI's third-party verifier in all of the TPVs submitted to the CAD combines the issue of which service is being changed with confirmation that the person on the call is authorized to make the change. It also does not distinguish between intrastate toll and interstate toll. Specifically, the BOI verifier asks, "You are authorized and are giving permission to Business Options to change your long distance phone service for [telephone number], correct?" Section 3(D) of the Commission's Rules requires separate verification of each service changed. Thus, BOI's third-party verifier should have asked individual questions and obtained separate and distinct answers to each question, rather than asking two or three questions in a long, compound sentence. Specifically, the BOI verifier should have first ascertained whether the person on the phone was authorized to make a switch in service and separately confirmed each

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<sup>11</sup>In the Matter of Business Options, Inc., Memorandum Opinion and Order, FCC Docket No. EB-03-85 (Dec. 8, 2003) at ¶ 22.

<sup>12</sup>See Exhibit D, William Brzycki Deposition, 7/18/03 at 114; Exhibit E, Kurtis Kintzel Deposition, 7/14/03 at 69.

service that was being changed as a result of the marketing call. BOI's verifiers did not take such steps and thus further contributed to the invalidity of BOI's TPVs.

The FCC recently found that BOI's verifiers failed specify the name of the new carrier and the fact that the customers intrastate service was about to be changed.<sup>13</sup> The FCC noted that by failing to name BOI as the new carrier, BOI left customers with the impression that their carrier was not being changed.<sup>14</sup> Further, by not even mentioning the fact that intrastate service would change, the slammed customers had no reason to know that they would be paying substantially more for intrastate toll service.<sup>15</sup>

The evidence described above establishes the infirmity of BOI's third-party verification process. The verifications produced F&G Verifications are *per se* invalid and in violation of Chapter 296 §§ 3(B)(3)(c–e) and 3(D). Based upon this evidence alone, the Commission can, and should, find that none of the carrier change orders submitted by BOI during 2002 were valid and, as a result, BOI committed at least 125 violations of the Commission's slamming Rules.

**B. Violations Based Upon Invalid TPVs Obtained Through Deceptive Practice**

In addition to BOI's fundamentally flawed TPV process, our investigation revealed that BOI used deceptive marketing and verification practices when contacting Maine consumers and that these practices contributed to 125 of the slamming violations committed by BOI. Most of the TPVs provided by BOI contain an affirmative response

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<sup>13</sup>In the Matter of Business Options, Inc., Memorandum Opinion and Order, FCC Docket No. EB-03-85 (Dec. 8, 2003) at ¶ 20.

<sup>14</sup>Id.

<sup>15</sup>Id.

by the consumer to the question, “You are authorized and are giving permission to Business Options to change your long distance phone service for [telephone number], correct?” However, when we played the TPV for the consumer and asked why they answered the question affirmatively, consumers said that they thought they were agreeing to something else because the BOI telemarketers that they spoken with earlier had represented themselves as Verizon or AT&T employees who were trying to “assist” the consumer by switching them to a lower cost plan<sup>16</sup> or by providing a single bill.<sup>17</sup> Others consumers said that BOI telemarketers claimed to be a contractor hired by the consumer’s phone company to find out if the consumer was satisfied with their toll service.<sup>18</sup> Still others were told by BOI telemarketers that government requirements mandated that the carrier reduce their rates and ask consumers to answer some questions.<sup>19</sup> Thus, none of the consumers were aware that the conversation had anything to do with changing their toll service to another carrier and answered affirmatively because they thought “Business Options” was a calling or billing plan – not a new toll carrier.

Many of the consumers specifically asked the BOI employee whether they worked for Verizon or AT&T and were either told “yes” or the employee avoided answering the question.<sup>20</sup> Many more consumers explicitly stated during the marketing

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<sup>16</sup> See Affidavits of Patricia Anderson, Lynne Fillmore, Laura German, and Henry Ramsey at Exhibit C.

<sup>17</sup> See Affidavits of Judith Brackett, Helen Osborne, Mary Prue, and Doris Shaw at Exhibit C.

<sup>18</sup> See Affidavits of Helen Bryant and Claudette Draper at Exhibit C.

<sup>19</sup> See Affidavit of Wanda Nickerson at Exhibit C.

<sup>20</sup> See Affidavits of Phyllis Freese, Laura German, and Lynne Fillmore at Exhibit C



call that they did not want to change their telephone service.<sup>21</sup> These consumers did all the right things to protect themselves from being slammed, yet were slammed anyway because of BOI's deceptive practices.

During the FCC's deposition<sup>22</sup> of BOI's former Vice-President, William Brzycki, he admitted that BOI employed a sales manager who encouraged BOI's telemarketers to represent themselves as employees of AT&T or large local exchange carriers.<sup>23</sup> He further stated that this person was employed during the time that BOI targeted Maine for telemarketing, January – March 2002.<sup>24</sup> Finally, Mr. Brzycki discussed similar problems with marketing personnel misrepresenting themselves as AT&T when calling customers in Mississippi.<sup>25</sup>

Thus, even though BOI produced a TPV for each of the switches, the Commission should find the consent given during the TPV process invalid because it is clear that any customer authorization to make a carrier change to BOI was obtained fraudulently. Because the TPVs are invalid, the Commission must find that BOI committed 125 slamming violations.

**C. Unauthorized Switches Made Without a TPV and BOI's Reprovisioning Practices**

In addition to the 125 deceptive changes, BOI could not produce evidence of a TPV for 70 other carrier changes; for 13 of these changes there was no TPV in

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<sup>21</sup> See Affidavits of Judith Brackett, Phyllis Freese, and Ida Smith at Exhibit C.

<sup>22</sup> The FCC's investigation is based, in large part, upon complaints from Maine consumers that the CAD forwarded to the FCC for enforcement.

<sup>23</sup> See Exhibit D, William Brzycki Deposition, 7/18/03 at 217 - 220.

<sup>24</sup> Id.

<sup>25</sup> Id. at 85.

violation of Section 3(B) generally, for 8 of the changes the TPV did not contain an affirmative response or the necessary personal information in violation of Section 3(B)(3), and for 49 of the changes, BOI could not produce a TPV for accounts it “re-provisioned” in violation of Section 3(B). Without a TPV, each of the 70 carrier changes must be considered unauthorized and a slamming violation.

Indeed, BOI’s “re-provisioning” practices garnered the attention of both the CAD and the FCC. According to both Kurtis Kintzel and William Bryzicki, upon learning that a recently acquired customer had switched to another carrier (often the customer had been slammed by BOI and then returned to their preferred carrier), it was BOI’s practice to “re-provision” the customer to BOI by submitting a second carrier change order without obtaining a second TPV from the customer.<sup>26</sup> BOI believed such a practice was justified because the customer did not specifically inform BOI of their plans to switch to another carrier.<sup>27</sup> However, William Brzycki recently admitted that there was, in fact, no justification for the reprovisioning system.<sup>28</sup>

BOI’s re-provisioning practice violates both state and federal slamming laws which require customer authorization each and every time a customer’s service is switched. Indeed, recently the FCC specifically found that BOI’s re-provisioning practices violated federal slamming rules which, like Maine law and the Commission’s Rules, require authorization for each change.<sup>29</sup> Thus, in addition to the 21 violations for lack of any TPV, the Commission should find that BOI committed 49 acts of slamming

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<sup>26</sup> Id.

<sup>27</sup> See Exhibit D, William Brzycki Deposition, 7/18/03 at 140-143; and Exhibit E, Kurtis Kintzel Deposition, 7/14/03 at 165-166.

<sup>28</sup> See Exhibit D, William Brzycki Deposition, 7/18/03 at 143.

<sup>29</sup> In the Matter of Business Options, Inc., Memorandum Opinion and Order, FCC Docket No. EB-03-85 (Dec. 8, 2003) at ¶¶ 19, 23.

when it submitted carrier change orders without first obtaining a valid authorization from BOI's former customer. These violations are particularly troublesome because they significantly inconvenienced consumers who were defrauded into taking BOI's service in the first place; these customers had to make numerous calls to their local exchange carrier, BOI, and the Commission to prevent BOI from reprovisioning them back to itself.

#### **IV. OTHER VIOLATIONS**

In addition to the slamming violations, our investigation uncovered the fact that BOI failed to collect fees pursuant to Chapter 285 (Maine Telecommunications Education Access Fund) and Chapter 288 (Maine Universal Service Fund). While BOI's failure to collect the fees is moot given that the majority of consumers were slammed and should not have been charged by BOI in the first place, these failures provide further evidence of BOI's general failure to comply with Maine law and Commission rules. Indeed, the FCC is currently investigating, as part of their slamming investigation, BOI's failure to make required contributions to universal support programs and the Telecommunications Relay Services Fund.<sup>30</sup>

#### **V. PENALTY**

Section 7 of Chapter 296 authorizes the Commission to assess a penalty of up to \$5,000 for each day a slamming violation continues, up to a maximum of \$40,000 for the first offense and a maximum of \$110,000 for subsequent offenses. In exercising such authority, the Commission is required to take into account "the severity of the violation, including the intent of the violator, the nature, circumstances, extent and

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<sup>30</sup>Id. at ¶ 4.

gravity of any prohibited acts, the history of previous violations, and the amount necessary to deter future violations.” The maximum penalty for the 195 unauthorized carrier change orders generated by BOI is \$19,430,000. However, Prosecutorial Staff recommends the imposition of a \$750,000 penalty based on the 10 consumer complaints described in detail below. The maximum penalty allowed under Maine law and Commission rules for these 10 complaints is \$890,000.<sup>31</sup>

**A. Specific Slamming Violations -- TPVs Provided But BOI Used Deceptive Marketing**

1. Wanda Nickerson<sup>32</sup>

Mrs. Nickerson received a call from a woman who said she was with Verizon. (Unknown to Mrs. Nickerson at that time, the caller actually was a BOI telemarketer.) The caller told Mrs. Nickerson that the government had ordered them to decrease their "line rate." Mrs. Nickerson read off all the surcharges on her Verizon bill. The caller told Mrs. Nickerson that instead of having all the fees itemized each month they would be shown in one block for \$4 less a month. Mrs. Nickerson was very skeptical about the call and asked the woman what she was trying to sell her. The caller repeated that the government had ordered “them” to reduce “their” fees and that she was just calling Mrs. Nickerson to save her some money.

The caller told Mrs. Nickerson that someone else would call back in a few minutes to confirm the information and that the second caller would not be able to answer any questions. The caller told Mrs. Nickerson that all she needed to do was give them her name and address. Mrs. Nickerson received the second call about 5

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<sup>31</sup> See Exhibit D, Penalty Calculation.

<sup>32</sup> See Affidavit of Wanda Nickerson at Exhibit C.

minutes later, and was only asked for her name and address. Mrs. Nickerson's service was changed to BOI on February 19, 2002 for 34 days. When she received her February bill from Verizon, she found that her Pine Tree calling plan had been removed and she had been charged \$9.75 for calls that would have been free under her plan. Mrs. Nickerson then filed a complaint with the CAD.

As part of the CAD investigation, Mrs. Nickerson listened to her TPV and confirmed it was her voice on the recording. Mrs. Nickerson said she felt the tape was altered because the first part of the conversation where the second caller is heard asking questions about switching to Business Options never took place. Further, because the BOI telemarketer had specifically stated she worked for Verizon, Mrs. Nickerson thought both the telemarketing conversation and TPV discussion were about her Verizon bills. The BOI telemarketer never said anything to indicate Mrs. Nickerson's preferred toll carrier was being change to Business Options. Thus, Mrs. Nickerson was unaware that the call was about changing her telephone service to another carrier.

The CAD found that BOI committed several violations of the Commission's slamming rules. First, the BOI telemarketer intentionally misrepresented herself as an employee of Verizon and mislead Mrs. Nickerson into believing that Business Options was a calling plan associated with Mrs. Nickerson's current carrier rather than a separate carrier. These deceptions invalidate any consent given by Mrs. Nickerson during the verification process. Second, as described more fully in Section IV(A) above, the TPV provided by BOI does not meet the requirements of Chapter 296, §§ 3(B)(3)(c) & (e) because the third-party verifier was owned, managed, controlled and/or directed by BOI and was located in offices adjacent to BOI. In addition, the verifier used the compound question described in Section IV(A) above and thus did not

separately inform the customer that he/she is authorizing a change in carrier and then confirm the authorization. In fact, Mrs. Nickerson says she was never asked the question heard on the TPV about authorizing a change to BOI.

In summary, BOI failed to obtain a valid authorization to make a carrier change as required by Chapter 296(3)(A) and thus slammed Mrs. Nickerson. The maximum penalty for this violation is \$110,000.

2. Patricia Anderson<sup>33</sup>

Mrs. Anderson received a phone call from a woman who told her she was with Mrs. Anderson's long distance carrier and that the carrier had a new program called Business Options. (Unknown to Mrs. Anderson at the time, the caller was a BOI telemarketer.) Mrs. Anderson assumed the caller was from AT&T because Mrs. Anderson's preferred carrier at the time was AT&T. She agreed to try the new program because she had always been happy with AT&T. The caller told Mrs. Anderson she would be transferred to a verifier and that Mrs. Anderson could not ask the verifier any questions because it would look like the caller was not doing her job. Mrs. Anderson was then transferred to the verifier and completed the verification process. Mrs. Anderson's service was changed to BOI on January 21, 2002, for 28 days. Mrs. Anderson realized that her service had been changed when she received a letter dated February 12, 2002, from AT&T stating they were sorry to lose a good customer. Mrs. Anderson then filed a complaint with the CAD.

As part of the CAD's investigation, Mrs. Anderson listened to her TPV and confirmed that it was her voice on the recording. However, because the BOI

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<sup>33</sup>See Affidavit of Patricia Anderson at Exhibit C.

telemarketer had stated she worked with Mrs. Anderson's current carrier, Mrs. Anderson believed that she was talking with AT&T and that "Business Options" was a program offered through AT&T, not that it was a separate telephone company. Mrs. Anderson was unaware the call concerned a change in her telephone service to a new carrier and she did not want to switch to another telephone company.

The CAD found that BOI committed several violations of the Commission's slamming rules. First, the BOI telemarketer engaged in deceptive marketing practices by misleading Mrs. Anderson into believing that Business Options was a calling plan associated with Mrs. Anderson's current carrier rather than a separate carrier. This deception invalidates any consent given by Mrs. Anderson during the verification process. Second, the TPV provided by BOI does not meet the requirements of Chapter 296, §§ 3(B)(3)(c) & (e) because the third-party verifier was owned, managed, controlled and/or directed by BOI and was located in offices adjacent to BOI. In addition, the verifier used the compound question described in Section IV(A) above and thus did not separately inform the customer that he/she is authorizing a change in carrier and then confirm the authorization.

In summary, BOI failed to obtain a valid authorization to make a carrier change as required by Chapter 296(3)(A) and thus slammed Mrs. Anderson. The maximum penalty for this violation is \$110,000. On February 25, 2002, pursuant to BOI's illegal re-provisioning process, Mrs. Anderson's service was changed for a second time to BOI for 14 days.<sup>34</sup> BOI could not provide proof of authorization for the

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<sup>34</sup>The second change was a result of BOI's "reprovisioning" Mrs. Anderson's service, as previously described in this report.

second change. The maximum penalty for this second violation is \$70,000. The total penalty for the two unauthorized changes involving Mrs. Anderson is \$180,000.

3. Doris Shaw<sup>35</sup>

Ms. Shaw received a call in early March from a woman who asked for her by name, repeated her name and telephone number, and confirmed that Ms. Shaw was with Verizon and AT&T for long distance service. (Unknown to Ms. Shaw at the time, the caller was a BOI telemarketer.) The caller told her there was a new law in Maine requiring one phone bill for all people on a fixed income. The caller told Ms. Shaw she would receive a bill with Verizon at the top of the page and her long distance provider, Business Options, at the bottom of the page. Mrs. Shaw said the caller told her the change would result in reduced rates but never told her the call was about changing carriers to BOI. Mrs. Shaw said the caller never asked any questions except to confirm that she understood what the caller was saying and to ask for her date of birth.

The caller told Ms. Shaw that in about 15-20 minutes she would receive another phone call from someone verifying that she had been called. About 10 minutes later, Ms. Shaw received a call from the verifier, who was also a woman. The caller asked if she was Doris Shaw, repeated her address and phone number, and asked if she had received a call from the first woman. Again, Ms. Shaw was not asked if she wanted to change carriers to Business Options. Ms. Shaw's service was changed on March 8, 2002 for four days. Ms. Shaw then filed a complaint with the CAD.

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<sup>35</sup> See Affidavit of Doris Shaw at Exhibit C.



As part of the CAD investigation, Ms. Shaw listened to her TPV and confirmed it was her voice on the recording. However, Ms. Shaw said the conversation on the recording was much longer than she remembered and that the verifier had only asked her one or two questions. Ms. Shaw said the verifier never told her the name of the verification company heard on the recording, nor did she mention Business Options. Ms. Shaw said she never intended to change her phone service and, because of the statements by the telemarketer, thought the calls were just to tell her about a government-mandated change in her bill.

The CAD found that BOI committed several violations of the Commission's slamming rules. First, the BOI telemarketer engaged in deceptive marketing practices by misleading Ms. Shaw into believing that Business Options was a government-mandated change in billing format associated with Ms. Shaw's current carrier rather than a separate carrier. This deception invalidates any consent given by Ms. Shaw during the verification process. Second, the TPV provided by BOI does not meet the requirements of Chapter 296, §§ 3(B)(3)(c) & (e) because the third-party verifier was owned, managed, controlled and/or directed by BOI and was located in offices adjacent to BOI. In addition, the verifier used the compound question described in Section IV(A) above and thus did not separately inform the customer that he/she is authorizing a change in carrier and then confirm the authorization. In fact, Ms. Shaw says she was never asked the question heard on the TPV about authorizing a change to BOI.

In summary, BOI failed to obtain a valid authorization to make a carrier change as required by Chapter 296(3)(A) and thus slammed Ms. Shaw. The maximum penalty for this violation is \$20,000.

4. Judith & Dwight Brackett<sup>36</sup>

Mrs. Brackett received a call in early January 2002 from a woman who said she was with Verizon and that she wanted to give Mrs. Brackett a better option for long distance calling instead of receiving separate Verizon and AT&T bills.

(Unknown to Mrs. Brackett at the time, the caller was a BOI telemarketer.) The caller asked Mrs. Brackett if she would like to receive all her charges on one bill, and Mrs. Brackett said she would. The caller told Mrs. Brackett she was marketing a package called "Business Options," and that all long distance calls would appear on her local phone bill.

Mrs. Brackett told the caller she was uncomfortable making any changes in her phone service because she had been slammed in the past. The caller told Mrs. Brackett that all the charges would appear on one bill, that there would be no additional fees, and that the rate for all in-state and out-of-state calls would be 7 cents/minute. Mrs. Brackett told the caller that this made sense because that was her rate with AT&T. Mrs. Brackett asked the caller if this change would affect her Pine Tree (her in-state calling plan with Verizon), and the woman said, "Oh no, this won't affect your Verizon bill." Because the caller told her she was with Verizon, Mrs. Brackett thought the whole conversation was about a new package from Verizon called "Business Options" that would combine her Verizon and AT&T charges onto one bill. Mrs. Brackett's service was changed to BOI on January 5, 2002 for 37 days.

When Mrs. Brackett received her next phone bill, it contained additional charges, the toll charges were higher than they used to be, and she no longer had her Pine Tree plan. Mrs. Brackett realized she had been slammed and called

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<sup>36</sup>See Affidavit of Judith Brackett at Exhibit C.

Verizon to return to her previous carriers, which were Verizon for in-state and AT&T for out-of-state, and then filed a complaint with the CAD.

As part of the CAD investigation, Mrs. Brackett listened to her TPV and said the questions were similar to what she remembered being asked (did she want to authorize a change, what was the month and day of her birth, etc.), but, because of what the telemarketer had told her, her responses were based on the assumption that she was talking with Verizon about combining all her charges onto one bill, not that she was changing to another carrier.

The CAD found that BOI committed several violations of the Commission's slamming rules. First, the BOI telemarketer engaged in deceptive marketing practices by misleading Mrs. Brackett into believing that Business Options was a calling/billing plan associated with Mrs. Brackett's current carriers, AT&T and Verizon, rather than a separate carrier. This deception invalidates any consent given by Mrs. Brackett during the verification process. Second, the TPV provided by BOI does not meet the requirements of Chapter 296, §§ 3(B)(3)(c) & (e) because the third-party verifier was owned, managed, controlled and/or directed by BOI and was located in offices adjacent to BOI. In addition, the verifier used the compound question described in Section IV(A) above and thus did not separately inform the customer that he/she is authorizing a change in carrier and then confirm the authorization. The maximum penalty for this violation is \$40,000 since it is considered the first violation for purposes of calculating the penalty.

5. Laura & James German<sup>37</sup>

Mrs. German received a call in early February 2002 from someone offering to lower her telephone rates because she paid her bills on time and did not make many long distance calls. (Unknown to Mrs. German at that time, the caller was a BOI telemarketer.) Mrs. German kept telling the caller she was happy with her current rates, but they were very insistent that they could lower her rates. She agreed to listen, but made it very clear on several occasions that she did not want her long distance service changed. Mrs. German eventually told the caller they could lower her in-state rates but not to touch her out-of-state service. The caller offered Mrs. German a rate of 7 cents/minute. When the caller told her they were representing her local phone company, Mrs. German asked if they were with Verizon. The caller said they were an independent company representing her local phone company and thus Mrs. German continued with the process. Mrs. German next spoke with a second person and answered some questions. Mrs. German's service was changed to BOI on February 6, 2002 for 6 days. Mrs. German realized her service had been changed when she received a call from MCI asking why she had left MCI. Mrs. German then filed a complaint with the CAD.

As part of the CAD's investigation, Mrs. German listened to her TPV and confirmed that it was her voice on the recording. Mrs. German said that while the questions on the recording were similar to the questions she was asked, because the caller said they represented her local phone company, she thought the sole purpose of the call was to lower her Verizon bill, not to change her toll carrier.

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<sup>37</sup> See Affidavit of Laura German at Exhibit C.

The CAD found that BOI committed several violations of the Commission's slamming rules. First, the BOI telemarketer engaged in deceptive marketing practices by misleading Mrs. German into believing she was speaking with Verizon and that her rates were being lowered rather than her service being switched to BOI. This deception invalidates any consent given by Mrs. German during the verification process. Second, the TPV provided by BOI does not meet the requirements of Chapter 296, §§ 3(B)(3)(c) & (e) because the third-party verifier was owned, managed, controlled and/or directed by BOI and was located in offices adjacent to BOI. In addition, the verifier used the compound question described in Section IV(A) above and thus did not separately inform the customer that he/she is authorizing a change in carrier and then confirm the authorization. The maximum penalty for this violation is \$30,000.

6. Helen Osborne<sup>38</sup>

Mrs. Osborne received a call from a woman who said she was with Verizon. (Unknown to Mrs. Osborne, the caller was a BOI telemarketer.) The caller told Mrs. Osborne she could save \$12 per month on her phone bill, and would also receive only one bill rather than two. Mrs. Osborne said she would like the savings, and assumed her long distance service was being changed to Verizon since the caller said she worked for Verizon. The caller told Mrs. Osborne that a "supervisor" would be calling to ask some questions, and that Mrs. Osborne should say "yes" to everything or the caller would lose her job. The "supervisor" (actually the third-party verifier) called Mrs. Osborne a few minutes later and asked if the previous caller had explained

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<sup>38</sup> See Affidavit of Helen Osborne at Exhibit C.

everything. The “supervisor” asked for Mrs. Osborne’s social security number, but Mrs. Osborne refused and was then asked for her date of birth instead. Mrs. Osborne’s service was changed on February 16, 2002 for 28 days. When Mrs. Osborne received her next bill and saw that it was \$11 higher rather than \$12 lower, she called Verizon and learned she had been switched to BOI. Mrs. Osborne then filed a complaint with the CAD.

As part of the CAD investigation, Mrs. Osborne listened to her TPV and confirmed it was her voice on the recording. Mrs. Osborne said that while the questions were similar to what the “supervisor” asked her, the recording did not include the request for her social security number. Mrs. Osborne also said that Business Options was never mentioned in the conversation. Because the first caller had specifically stated that she worked for Verizon, Mrs. Osborne thought she was changing to Verizon and was not aware that she was changing her service to BOI nor did she intend to change her phone service to BOI.

The CAD found that BOI committed several violations of the Commission’s slamming rules. First, the BOI telemarketer engaged in deceptive marketing practices by misleading Mrs. Osborne into believing that Business Options was a calling plan associated with Verizon, rather than a separate carrier. This deception invalidates any consent given by Mrs. Osborne during the verification process. Second, the TPV provided by BOI does not meet the requirements of Chapter 296, §§ 3(B)(3)(c) & (e) because the third-party verifier was owned, managed, controlled and/or directed by BOI and was located in offices adjacent to BOI. In addition, the verifier used the compound question described in Section IV(A) above and thus did not separately inform the customer that he/she is authorizing a change in

carrier and then confirm the authorization. The maximum penalty for this violation is \$110,000.

**B. Specific Violations -- Unauthorized Switches Made Without a TPV**

1. Roger Cloutier<sup>39</sup>

Mr. Cloutier received a call in October 2001 from somebody who said they worked for Verizon and that they could lower his rates. (Unknown to Mr. Cloutier at the time, the caller was a BOI marketer.) Mr. Cloutier agreed to change his interstate service only to Verizon (actually BOI). Mr. Cloutier was switched to BOI for both intrastate and interstate service on February 1, 2002, for 47 days. When Mr. Cloutier noticed that his bills were rising dramatically, he called Verizon and learned that his service had been switched to BOI. Mr. Cloutier then filed a complaint with the CAD.

When the CAD asked BOI to provide proof of authorization and verification for Mr. Cloutier, BOI said the verification company failed to record the conversation with the customer and thus it could not provide a TPV nor could it provide any other proof of authorization.

BOI's failure to provide any proof of authorization of the carrier change as well as Mr. Cloutier's statements regarding the misrepresentations made by the BOI telemarketer, provide clear evidence that BOI slammed Mr. Cloutier in violation of Chapter 296, § 3(B). In addition, BOI violated § 3(B)(3)(a) which requires the third-party verifier to maintain the verification data for two years. The maximum penalty for this violation is \$110,000.

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<sup>39</sup>See CAD Case Notes for Roger Cloutier at Exhibit H.

2. Sandra Kalloch<sup>40</sup>

Ms. Kalloch was switched to BOI on February 6, 2002, for 44 days. Ms. Kalloch discovered her service had been changed to BOI when her phone billed showed charges by BOI. Ms. Kalloch does not recall ever receiving a telemarketing call about her phone service and states that she was in the hospital at the time the change in service was made. Because she lives alone and nobody else was in her home during her hospital stay, Ms. Kalloch could not understand how anyone could have authorized the switch in service. Thus, Ms. Kalloch filed a complaint with the CAD.

When the CAD asked BOI to provide proof of authorization and verification for each customer, said the verification company failed to record the conversation with the customer and thus it could not provide a TPV nor could it provide any other proof of authorization.

BOI's failure to provide any proof of authorization of the carrier change as well as Ms. Kalloch's statements regarding her hospital stay at the time of the switch, provide clear evidence that BOI slammed Ms. Kalloch in violation of Chapter 296, § 3(B). In addition, BOI violated § 3(B)(3)(a) which requires the third-party verifier to maintain the verification data for two years. The maximum penalty for this violation is \$110,000.

3. Edith McGinnis<sup>41</sup>

Ms. McGinnis was switched to BOI on February 18, 2002, for 85 days. She realized she had been switched when the carrier change fee appeared on her local service bill from Mid-Maine Communications. Ms. McGinnis states that she

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<sup>40</sup> See CAD Case Notes for Sandra Kalloch at Exhibit I.

<sup>41</sup> See CAD Case Notes for Edith McGinnis at Exhibit J.



never authorized a change to BOI. When she contacted BOI to tell them she never authorized the switch, BOI responded that she “didn’t say no” and indicated they would continue to bill her. Ms. McGinnis then filed a complaint with the CAD.

When the CAD asked BOI to provide proof of authorization and verification for Ms. McGinnis, BOI said the third party verifier was unable to locate the TPV and thus it could not provide a TPV nor could it provide any other proof of authorization.

BOI’s failure to provide any proof of authorization of the carrier change as well as Ms. McGinnis’s statements that she had authorized any changes in toll providers, provide clear evidence that BOI slammed Ms. McGinnis in violation of Chapter 296, § 3(B). In addition, BOI violated § 3(B)(3)(a) which requires the third-party verifier to maintain the verification data for two years. The maximum penalty for this violation is \$110,000.

4. Terry Knight<sup>42</sup>

Ms. Knight was switched to BOI on February 11, 2002, for 14 days. In the course of investigating a complaint by Ms. Knight that she had been slammed by another carrier (WCSS, Inc.), the CAD noticed charges from BOI on Ms. Knight’s bills. Ms. Knight said she had never authorized any changes to her toll service.

When the CAD asked BOI to provide proof of authorization and verification for each customer, BOI said the third party verifier was unable to locate the TPV and thus it could not provide a TPV nor could it provide any other proof of authorization.

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<sup>42</sup>See CAD Case Notes for Terry Knight at Exhibit K.

BOI's failure to provide any proof of authorization of the carrier change as well as Ms. Knight's statements that she never authorized a change in carrier, provide clear evidence that BOI slammed Ms. Knight in violation of Chapter 296, § 3(B). In addition, BOI violated § 3(B)(3)(a) which requires the third-party verifier to maintain the verification data for two years. The maximum penalty for this violation is 70,000.

**C. Recommendation**

Upon consideration of all of these facts, the Prosecutorial Staff recommends the Commission take the following actions:

1. Impose an administrative penalty of \$750,000

BOI willfully violated Maine law and Commission rules and engaged in a pattern of deceptive practices intended to defraud Maine consumers. The harm caused by BOI is significant; BOI has the highest number of slamming violations against it of any carrier investigated by the CAD. BOI intentionally deceived customers, many of who were elderly, by claiming they worked for Verizon or AT&T and asking the customers misleading and deceptive questions about their phone service, and failing to inform the customers the call was about changing carriers to BOI. BOI's conduct in Maine is specifically the type of conduct which lead to the passage of both federal and state slamming laws and therefore should be addressed by the full application of the penalty provisions of the slamming law.

We believe the imposition of a \$750,000 penalty reflects the appropriate balance of the factors listed in Maine law and Commission Rules that guide the determination of the appropriate penalty amount. First, we gave no mitigating consideration regarding the intent of the violator or the nature, circumstances, and

gravity of BOI's violations in Maine. BOI's own employees have admitted to knowledge of the fraudulent practices used by BOI marketing and verification personnel. Second, BOI preyed upon elderly customers and allowed, even encouraged, its personnel to tell outright lies regarding who they worked for and what customers were agreeing to do. The behavior exhibited by BOI is specifically the type of behavior the Legislature intended to penalize for slamming; BOI's actions were intentional, not accidental, and as such deserve to be strongly penalized.

The two factors that provide some mitigation in calculating a penalty are the carrier's lack of previous offenses and the amount needed to deter future violations. Prior to the onslaught of complaints received in January 2002, the CAD had not received any complaints against BOI. This may be because BOI did not operate in Maine prior to that time but it may also be that all of the complaints related to this case arose from a specific period of marketing done by BOI to Maine customers in early 2002. We also believe that a penalty of \$750,000 is sufficient to deter future violations and that a higher penalty would not add any deterrence.

By imposing the penalty requested by the Prosecutorial Staff, the Commission will make clear that it takes slamming violations very seriously and will not tolerate the deceitful, fraudulent practices of carriers like BOI.

2. Revoke BOI's Certificate

BOI's certificate to provide service as a switchless reseller interexchange carrier in Maine should be revoked so that no other Maine consumers are defrauded.

3. Refer this matter to the Attorney General's Office

BOI's actions may rise to the level of criminal offenses under the Maine Deceptive Trade and Fair Practices Act. Thus, this matter should be referred to the Attorney General's Office for further investigation into the fraudulent nature of BOI's operations.

Respectfully submitted,

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Trina Bragdon  
Derek D. Davidson  
Mary Rudd James